Office-Supreme Court, U.S.
FILED
APR 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1868

SUPREME COURT OF THE UNITED STATES

October Term 1981

---

ROLAND C. BLANCHET - - - - Petitioner

versus

THE PEOPLE OF THE STATE
OF NEW YORK - - - - Respondent

---

# PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS AND APPENDIX

---

ROLAND C. BLANCHET
R.D. 2, Box 148
Troy, New York 12182
(518) 235-7678

Filing "pro se"

October ___, 1981

## QUESTION PRESENTED

Where the issues of law in a criminal case (proof beyond a reasonable doubt of every element(s) of the crime charged and the felonious intent to commit a criminal act) are not properly addressed by the lower courts, was the defendant deprived of due process of law by being denied leave to appeal by a New York State Court of Appeals judge?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities ..... | iii-v |
| Opinions Below ..... | 2 |
| Jurisdiction ..... | 2 |
| Question Presented ..... | i,3 |
| Constitutional and Statutory Provisions Involved ..... | 3-5 |
| Statement of the Case ..... | 5-6 |
| Reason for Granting the Writ ... | 6-36 |
| Conclusion ..... | 36-38 |
| Appendix ..... | 39-45 |
| Appendix A (Order of the State of New York Court of Appeals at Albany, New York) ..... | 39-40 |
| Appendix B (Order of State of New York County Court, County of Rensselaer) ..... | 41-42 |
| Appendix C (Decision of the Court, State of New York, Troy Police Court, Rensselaer County, City of Troy) ..... | 43-45 |

## TABLE OF AUTHORITIES


| Statutes: | Page |
|---|---|
| U.S. Constitution (Amendment XIV, Section 1). U.S. REPORTS, Vol. 442, June 18, 1979, p. 527. | 3 |
| Penal Law Section 155.25. Samuel G. King, COMPLETE GUIDE TO EVERYDAY LAW, 3rd Ed. (Maryland: Pyramid Publishers, 1977) pp. 495-497. | 4 |
| **Cases:** | |
| In re Winship, 397 US 358, 363-364 (1970) | 19,20, 26 |
| Matter of Hall, 43 AD2d 465, 475 (4th Dept 1974) | 16 |
| Morissette v. United States, 342 US 246 (1952) | 25 |
| Morissette, supra, at 275 | 26 |
| Mullaney v. Wilbur, 421 US 684 (1975) | 25 |
| Mullaney, supra, at 524 | 27 |
| People v. Butler, 67 AD2d 950 (2d Dept 1979) | 31 |
| People v. Carter, 40 NY2d, 933, 934 (1976), reversing 49 AD2d 546 (1st Dept 1975) | 31 |
| People v. Chapman, 191 App Div 660, 661-662 (2d Dept 1970) | 22 |

Cases: (Cont'd) Page

People v. Clark, 64 AD2d 669 (2d Dept 1978) 31

People v. Eckert, 2NY2d 126, 129 (1956) 23

People v. Foley, 307 NY 490 (1954) 22

People v. Foley, supra, at 493 29

People v. Fluker, 51 AD2d 1045, 1046 (2d Dept 1976) 33

People v. Hickman, 34 AD2d 831 (2d Dept 1970) 33

People v. Insogna, 28 AD2d 771, 773 (3d Dept 1967) 29

People v. Jackson, 7 NY2d 142, 144 (1959) 33

People v. Lavello, 1 NY2d 436, 439 (1956) 31

People v. Lewis, 275 NY 33 (1937) 22

People v. Lewis, supra, at 39 29

People v. Mantesta, 27 AD2d 748 (2d Dept 1967) 33

People v. McNair, 48 AD2d 860, 861 (2d Dept 1975) 32

People v. Necosia, 164 Misc 152, 156 (Co Ct Kings Co 1937) 16

People v. Pettucelli, 44 AD2d 58 (1st Dept 1974) 34

Cases: (Cont'd) Page

People v. Rice, 61 AD2d 758 (1st Dept 1978) 22

People v. Rifenburgh, 29 AD2d 897, 898 (3d Dept 1968) 29

People v. Russell, 266NY 147, 151 (1934) 23

People v. Sutton, 49 Misc 2d 331, 332 (City Court of Long Beach, 1966) 24

People v. Thomas--AD2d--,422 NYS2d 394, 396 (1st Dept 1979) 30

People v. Trimarchi, 321 NY 263 (1921) 22

People v. Wright, 17 AD2d 151 (1st Dept 1962) 33

Sandstrom v. Montana, 442 US 527 (1979) 27

Speiser v. Randall, supra (357 US 513 (1958) at 525-526 19

United States v. United States Gypsum, 438 US at 445 (1978) 24

United States v. United States Gypsum, supra, at 422 and 446 25, 26

SUPREME COURT OF THE UNITED STATES

October Term 1981

No.

---

Roland C. Blanchet - - - Petitioner

v.

The People of the State - of New York Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS AND APPENDIX

---

Petitioner, Roland Blanchet, respectfully prays that a Writ of Certiorari issue to review the Order of the New York State Court of Appeals entered in the above entitled case on January 12, 1981.

## OPINIONS BELOW

The Opinion of the New York State Court of Appeals was entered on January 12, 1981 (see Appendix A, pp. 40-41. The Opinion was that there was no question of law presented. The Opinion of the County Court of Rensselaer was entered on August 13, 1980 (see Appendix B, p. 42-43. The Opinion was affirmed. The Opinion of the Police Court of Troy, New York was entered on November 29, 1978 (see Appendix C, p. 44-46. The Opinion was conviction of a misdeameanor (petit larceny).

## JURISDICTION

The Order of the New York State Court of Appeals was entered on January 12, 1981. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

## QUESTION PRESENTED

Where the issues of law in a criminal case (proof beyond a reasonable doubt of every element(s) of the crime charged and the felonious intent to commit a criminal act), are not properly addressed by the lower courts, was the defendant deprived of due process of law by being denied leave to appeal by a New York State Court of Appeals judge?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution (Amendment XIV, Section 1) states:

The 14th Amendment's guarantees prohibit a State from shifting to the defendant the burden of disproving an element(s) of the crime charged.

Penal Law Section 155.25 states:
A larceny is a wrongful and fraudulent taking and carrying away of personal goods of another with felonious intent to make them the property of the taker. To constitute a taking the property must be actually removed. The presumption of guilt in a larceny case should never be applied when there is reasonable ground to conclude that the witness(es) may be mistaken, or that the evidence is not clearly and satisfactorily established, or when from any cause the identity of the stolen article(s) is not found in the possession of the accused. Where other persons reside, work, or patronize they to are capable of larceny. The corroborative or

explanatory circumstances must be supported by proof arising from possession of others property.

STATEMENT OF THE CASE

Defendant appeals from a conviction of violation of Penal Law Section 155.25 in Police Court, City of Troy (Spain, J.) following a non-jury trial held November 29, 1978, and the sentence imposed, that defendant pay a $150.00 fine. The fine was paid.

Notice of appeal, dated December 19, 1978 was timely filed in Rensselaer County Court (N.Y.). This appeal was perfected following retention of appellate counsel November 29, 1978. The County Court affirmed the conviction August 13, 1980. On January 12, 1981, Associate Judge Jones of the New York State Court of Appeals denied the appeal to be heard

by the New York State Court of Appeals stating the case did not involve a question of law.

Petitioner is petitioning the Supreme Court of the United States to grant a Writ of Certiorari for the purpose of reviewing the Order of the New York State Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The defendant was not proved guilty of a crime beyond a reasonable doubt by the lower court(s) of every element(s) of the crime charged including felonious intent to commit a criminal act.

That defendant's family stopped at the Gasland station on October 27, 1978 cannot be doubted. What is open to serious question, however, is that any crime was committed there. Inasmuch as

the evidence adduced at trial failed to establish that the crime of petit larceny had been committed, and that Roland Blanchet committed it, the People failed to establish appellant's guilt beyond a reasonable doubt, and his conviction must be reversed.

The proof in this case clearly establishes that on the night of October 27, 1978, defendant stopped with his family at the Gasland station in North Troy. It is undisputed that defendant left the driver's seat of the car and that he went to the rear of the car where he removed the gas filler cap. It is also undisputed that he replaced the cap, got into his car, and drove off. There is no question that he waved off Ernie Anderson when Anderson came running after the car, and there can be no doubt that the car

left slowly and did not "burn rubber" or give any other evidence of haste. Finally, there is no doubt that Roland Blanchet did not pay for any gas at the Gasland station that night.

What the evidence does not establish, certainly not to the degree necessary in a criminal trial, is that there had been any reason for Mr. Blanchet to have paid for any gas. For there is insufficient evidence, as a matter of law, that defendant had taken any gas from the Gasland station that night.

It must be remembered that there was no particular sense of urgency surrounding the purchase of gasoline that night. The tank was low, but not dangerously so. Roland Blanchet was able to drive to Albany and back almost to his home in Speigletown the next day before he pur-

chased any gas. Judge Spain recognized the point made by the defense that the Blanchet car was not in immediate need of gas that night (see trial transcript, pp. 82-83).

The uncontradicted evidence established that the Blanchets were not without funds. Both the adult Blanchets had good jobs and they had just made a deposit in their checking account.

The fact that their daughter had to go to the bathroom while they were out was surely not an unusual experience for parents of a young child, and was not such an emergency that Roland would steal gasoline and then deny the theft. Certainly there was no motive established for the commission of such a crime in the presence of Ernie Anderson, who had known Roland for many years. It is more reasonable to

assume that, under the circumstances, if defendant really had pumped his own gas and had to leave abruptly, he would have called out to Ernie that he had to leave and would pay him later.

In short, the whole allegation of petit larceny was illogical and absurd, considering the circumstances of this case. Examination of the prosecution's evidence demonstrates that there was no proof beyond a reasonable doubt that a crime was committed at all, much less committed by Roland Blanchet.

The People's witnesses were two Gasland employees on duty that night, Ernie Anderson and Richard Goyer. It is undisputed that during the entire time the Blanchets were at the gas station, Goyer was inside the office, which had its front windows covered with advertising posters, severely

restricting the view (30, 41, 42). Goyer, by his own testimony, was simultaneously talking on the telephone and selling cigarettes to several customers while he was observing what went on outside the busy gas station (38, 42). Even though he had never before seen Roland Blanchet, and had no reason to pay special attention to the Blanchet car, Goyer was sure that he remembered seeing the Blanchet car drive into the station, sure that he saw defendant pump his own gas, sure that he could read the numbers turning on the pump from his location inside the office some 25 feet away, and sure that defendant left without paying for gas he had pumped (38, 39, 40, 61).

Yet Goyer was also sure that when defendant started to drive away, Anderson was outside (49, 55). He was

as certain about that as he was about every other part of his testimony (50). However, each of the other witnesses, Anderson and the Blanchets, recalled that Anderson had been inside of the office and ran out of the office when the Blanchet car started to leave (13, 75, 91).

Goyer testified that he had called Roland Blanchet twice that night (40). Anderson and defendant each testified that it was Anderson who had called twice (15, 76).

Goyer testified in much detail about what Mr. Blanchet did while in the gas station, yet he could not remember if there was any car closer to the office (both of the Blanchets had testified that there was a large green car parked at the same pump, on

the side of the island closer to the office, and that this car left while they were at the gas station) (46, 74, 89). Goyer was sure he saw Mr. Blanchet pumping gas into his car, but could not even recall the make of car or which side of the car the filler cap was on (38, 46). Nor could Goyer recall whether or not his customers for cigarettes were young women (other witnesses testified that such was the case), and he did not recall whether anyone was standing inside the office with him at the time Mr. Blanchet drove away (29, 42, 48, 72, 96).

It is readily apparent that Goyer's testimony was incredible and could not be a basis for finding defendant guilty beyond a reasonable doubt.

It is also readily apparent that Goyer's testimony was rehearsed and must be discounted.

Obviously concerned as to how he could testify that he had seen everything so well through the small spaces between the posters, Goyer was unresponsive early in his cross-examination:

> Q. And about this gas station, is it brightly lighted?
> A. Yes.
> Q. Very brightly lighted?
> A. Very clean windows.
> Q. Very clean windows?
> A. Yes.
> Q. Anything on the windows at all?
> A. Yes, quite a few posters. But I was standing directly in front of the --
> Q. Would you just answer the question, sir.
> THE COURT: Let me explain to Mr. Goyer. It's hard to do that sometimes but I want you to work at it and just stick to that.
> WITNESS: Yes.

(40-41)

Later, the following was said:

> Q. And how far from the door were you standing, at the telephone?
> A. The door, six feet.
> Q. I mean in what direction, sir?
> A. I always look straight out the windows.

(43)

Such was the testimony credited by the trial court.

The testimony of Ernie Anderson contradicted Goyer's testimony in many respects. The two witnesses cannot be considered corroborative of each other, for they differ as to vital points, e.g., where Anderson was at the time the Blanchet car started to leave, and who called defendant on the telephone. (It must be remembered that the trial occurred just a month after the date of the alleged crime.) Testimony like that of these witnesses does not rebut the presumption of innocence with which defendant began the trial.

By virtue of the presumption, where testimony of witnesses for the prosecution is inconsistent, the burden is upon the prosecution to reconcile the inconsistent testimony since the defendant is safeguarded with the presumption of innocence (Matter of Hall, 43 AD2d 465, 475 (4th Dept 1974); People v. Nicosia, 164 Misc 152, 156 (Co Ct Kings Co 1937). The burden never shifted to the defendant. He did not have to explain why he was at the back of his own car. (Of course he was able to do so in a very satisfactory manner.)

From the decision of the trial court it appears that Judge Spain used the testimony of Betty Blanchet to buttress the testimony of the prosecution's witnesses: "I believe that the testimony of his wife was consistent with what the facts that were presented here today

was" (116). Yet her testimony was consistent with the defendant's and nowhere provides proof that he pumped gas into his car.

Betty Blanchet had testified clearly that she observed her husband walk to the rear of their car to remove the filler cap, as was his practice. She heard the sound of the cap being removed. Facing in the direction of the gas pump (she was in the right front seat and turned so she could observe her child, in the back of the car), she did not see Roland touch the hose or pump (93, 94-95).

Upon cross-examination, she was scrupulously honest. Betty agreed that the sound of the filler cap being taken off could also have been the combination of the cap being taken off and the hose nozzle being inserted (94). How-

ever, she did not testify that indeed such was the case. Her testimony provides no positive proof that defendant put any gas in the car.

Judge Spain, by stating in his decision that "there are some times that the Court wishes that Solomon were here" indicates the closeness of the evidence in this case. The evidence for the prosecution would not have justified a verdict in a civil case, and does not approach the standard for conviction in a criminal trial. From the language of his decision, it appears that Judge Spain weighed the evidence and found the balance slightly tipped toward the prosecution. Such an approach is reversible error, as it constitutes a violation of fundamental constitutional rights of the defendant.

The requirement for a higher standard of proof in a criminal trial, proof beyond a reasonable doubt, has a fundamental place in our jurisprudence. The United States Supreme Court stated, In re Winship, 397 US 358, 363-364 (1970), that:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

The Court continued:

> As we said in Speiser v. Randall, supra, (357 US 513 (1958) at 525-526: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account.

> Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of *** persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.***"
> (397 US at 364)

In the court below this "margin of error" was not properly taken into account. A criminal conviction cannot be had when the trier of fact believes merely that the scale is tipped slightly in the direction of the prosecution. The reasonable doubt standard must be employed. Failure to use that standard, as in this case, deprives the defendant of due process of law. As the Supreme Court stated in Winship (397 US at 364), "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against con-

viction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".

It is apparent from Judge Spain's decision that he considered, and credited toward the prosecution, much circumstantial evidence in reaching his conclusion that defendant was guilty. Such reliance upon the circumstantial evidence in this case was reversible error. When circumstantial evidence is employed, all of the evidence must, beyond a reasonable doubt, exclude or remove every other reasonable hypothesis than that of defendant's guilt; to justify conviction, the evidence of facts and circumstances must all be consistent with and point not only to the guilt of defendant, but must be inconsistent with his innocence

(People v. Trimarchi, 231 NY 263 (1921). The evidence in this case does not come close to meeting this standard.

As the Court said in People v. Chapman, 191 App Div 660, 661-662 (3d Dept 1920), "It is possible that the defendant actually committed the crime with which he is charged, but the evidence does not exclude the practically even chance that he may be innocent". With such a paucity of proof, the prosecution has not met its burden and the conviction cannot stand. "Where the credible evidence is equally consistent with guilt or innocence the People have failed to prove defendant's guilt beyond a reasonable doubt" (People v. Rice, 61 AD2d 758 (1st Dept 1978); see People v. Foley, 307 NY 490 (1954); People v. Lewis, 275 NY 33 (1937).

As observed by the trial court, the evidence in this case was closely balanced, requiring a Solomon-like decision to determine which side was telling the truth. When the evidence is that close there cannot be a conviction, for the high standard of proof required in a criminal case is not present. The evidence in this case does not permit a "yes" answer to the question "doesthe evidence logically point to the defendant's guilt, and exclude, to a moral certainty, every other reasonable hypothesis?" (People v. Eckert, 2 NT2d 126, 129 (1956). Thus, the conviction must be reversed.

Especially in a close case such as this, careful scrutiny of the evidence and appraisal of the probabilities is called for (see People v. Russell, 266 NY 147, 151 (1934). Where the evidence

is close, care must be taken that the burden is not shifted to the defendant. For, although Roland Blanchet was able to explain what he was doing at the rear of his car, he was not required to do so. The People had to prove that he was filling his car with gas. The prosecution had to supply every step in a logical process which would exclude the probability of his innocence. "Conjecture, surmise, speculation or inference cannot replace proof however great the temptation to compromise may be" (People v. Sutton, 49 Misc2d 331, 332 (City Courtof Long Beach 1966).

In the United States v. United States Gypsum Co., 438 U.S. at 445 (1978) "(t)he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of pur-

pose or the more general one of knowledge or awareness." The People's evidence does not provide the Court with sufficient knowledge that defendant intended to steal gasoline.

Because the People may have interpreted the presumption of the defendant committing a criminal act by shifting the burden of persuasion like the presumptions as conclusive in Morissette v. United States, 342 U.S. 246 (1952), and United States v. United States Gypsum Co., 438 U.S. 422 (1978) or as shifting the burden of persuasion like that in Mullaney v. Wilbur, 421 U.S. 684 (1975) and because either interpretation would have violated the 14th Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt. In Blanchet v. The People of New

York State the People's testimony is unconstitutional because every element of the crime was not proven beyond a reasonable doubt.

Conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." Morissette, supra, at 275 "and they invade (the) factfinding function," United States Gypsum Co., at 446 which is assigned by law in a criminal case.

In the case in question, Blanchet v. The People of New York State, the circumstantial evidence was void of facts that prove beyond a reasonable doubt a crime was committed or the defendant intended to steal gasoline.

The State is required by law to prove every fact necessary to constitute a crime charged. In re Winship, 397 U.S. 358, 364

(1970) the defendant was deprived of his constitutional rights because the presumption of guilt was unconstitutionally shifted to the defendant. Such a presumption was found constitutionally deficient in Mullaney, supra, p. 524.

In Sandstrom v. Montana, 442 U.S. 527 (1979) the Chief Justice and Mr. Justice Rehnquist concurred that the 14th Amendment to the United States Constitution prohibits any State from depriving a person of liberty without due process of law, and in Mullaney v. Wilbur, 421 U.S. 684 (1975) this Court held that the 14th Amendment's guarantees prohibit a State from shifting to the defendant the burden of disproving an element of the crime charged. Basing their judgment on inconclusive evidence presented by the People's witnesses,

the lower courts deprived the defendant (Roland Blanchet) of due process of law by disproving that the defendant feloniously intended to steal gasoline and also provided insufficient evidence to prove beyond a reasonable doubt every element of the People's testimony that a crime was committed by Roland Blanchet on the eve of October 27, 1978.

The prosecution cannot rely on circumstantial evidence to make up for defieiencies in its proof. The People's evidence in this case does not lead exclusively to the inference that defendant pumped his own gas and then left without paying.

> It has long been the well-founded rule that where the record of circumstantial evidence does not exclude to a "moral certainty" the hypothesis of a defendant's innocence, a prima facie case has not been made out * * * and where inferences are to be drawn from the evidence to establish guilt,

> they "must be of such a character as, if true, to exclude to a moral certainty every other hypothesis but that of the guilt of the accused, and that the ultimate fact may not be based on inference upon inference." (People v. Lewis, 275 NY 33, 39; People v. Foley, 307 NY 490, 493).
>
> (People v. Insogna, 28 AD2d 771, 773 (3d Dept. 1967); some citations omitted).

Where proof in a criminal case is dependent, as here, upon both direct and circumstantial evidence, the facts from which inferences are to be drawn must be established by direct proof, the proved facts must exclude to a moral certainty every hypothesis except that of guilt of the offense charged, and all the proved facts must not only be consistent with and point to guilt, but they must be inconsistent with innocence (People v. Rifenburgh, 29 AD2d 897, 898 (3d Dept (1968).

Failure to adhere to the reasonable doubt standard is an error of constitutional magnitude, which cannot be considered "harmless" (see People v. Thomas, -- AD2d --, 422 NYS2d 394, 396 (1st Dept 1979). Although the defendant walked to the rear of his car while at the Gasland station, the People's evidence does not conclusively prove he pumped gas into his car and left without paying for it. The People's proof at trial not having met the standards discussed above, the judgment must be reversed and the case dismissed.

2. The prosecutor deprived defendant of a fair trial by his improper remarks during summation.

It is a fundamental error, amounting to deprivation of the right to a fair trial, when a prosecutor vouches for the

veracity of his witnesses and makes himself an unsworn witness, not subject to cross-examination (see e.g., People v. Carter, 40 NY2d 933, 934 (1976), reversing 49 AD2d 546 (1st Dept 1975); People v. Lovello, 1 NY2d 436, 439 (1956); People v. Butler, 67 AD2d 950 (2d Dept 1979); People v. Clark, 64 AD2d 669 (2d Dept 1978).

In this case the prosecutor committed that error, going beyond the bounds of proper comment on the evidence. He stated, inter alia:

> The witnesses I put on the stand weren't impeached. They told a direct, forthright story. And the defendant got on the stand and could give me no reason why they would lie against him. I don't know why people steal things. I have no idea. In 10 years I have learned new things each day. Why one person does it I don't think I can give a reason. Because a man has a Masters degree, I have a PhD, that doesn't mean I'm not subject to the problems of the time, that I wouldn't do what he'd

> done. I know it's alleged what he has done. And by the testimony, from that stand, unimpeached, he did it. And as Mr. Armstrong said, people see what they want. But I think it falls to its fate when you heard the direct testimony of Mr. Anderson that he saw this and this is it. And he knows the man, he talked to the man. There is no doubt in my mind, regardless of all the circumstances you want to bring into the case, they haven't negated the direct testimony of Mr. Anderson. (116)

This language is the same sort of improper language which has been condemned time and again by the appellate courts. By stating his belief as to the veracity of the witnesses, the prosecutor committed the error criticized by the Appellate Division, Second Department in People v. McNair, 48 AD2d 860, 861 (2d Dept 1975), where the court quoted the prosecutor as having said "I don't believe that story. I don't think it's true".

The prosecutor's remarks concerning his years of experience and the causes of people stealing things is a classic example of a prosecutor's placing "his own veracity and official position in the scales against the accused" (People v. Jackson, 7 NY2d 142, 144 (1959); see People v. Mantesta, 27 AD2d 748 (2d Dept 1967). Such a statement by the prosecutor in summation is especially harmful in a case such as this which depends entirely upon the credibility of the witnesses (see, e.g., People v. Hickman, 34 AD2d 831 (2d Dept 1970); People v. Wright, 17 AD2d 151 (1st Dept 1962).

Error of this type is so prejudicial that the interest of justice requires reversal on this ground even where no objection was made by defense counsel at trial (People v. Fluker, 51 AD2d 1045, 1046 (2d Dept 1976).

As noted by the Court in People v. Petrucelli, 44 AD2d 58 (1st Dept 1974), not only is the expression by a prosecutor of his personal opinion of the witnesses' credibility improper, it may be a violation of Code of Professional Responsibility, EC 7-24.

The remarks by the prosecutor having deprived defendant of a fair trial, the judgment must be reversed.

3. The sentence is excessive and the conviction is legally unwarranted.

As established at trial, defendant is an ambitious man who works six days a week to support his family. He has completed a Master's Degree in Education. Recognizing the fact that defendant would prefer to work in education, his employer gave him a raise seeking to induce him to stay in his present job. The present

criminal conviction, even though it involves the relatively minor charge of stealing $7.50 worth of gasoline, nevertheless is by itself severe punishment. The presence of this conviction on defendant's record will make it far more difficult for him to obtain employment in the field of education, the goal for which he studied for many years.

Roland Blanchet is a man of principle and pride. His reputation is worth a great deal to him. This explains why, feeling that he was wrongly accused with taking a small amount of gasoline, he did not simply pay the amount involved, and has continued to fight the criminal charge, as a matter of principle.

It is obvious that the fine imposed by Judge Spain has no value as deterrent or punishment in comparison to the

enormous value of the conviction itself. Especially in a case such as this, where the evidence is so close, a fine of $150.00 is excessive. Roland Blanchet has invested much of himself, physically, emotionally and fiscally, in his defense. The fine is unnecessary and should be eliminated entirely or substantially reduced.

The defendant in this case (Roland Blanchet) was convicted of a crime without due process of law. Therefore, the judgment of conviction must be reversed and the case dismissed.

## CONCLUSION

Petitioner believes that his constitutional rights were violated because the courts below deprived him of due process of law as guaranteed by the 14th Amendment (Section 1) to the United States

Constitution. According to this Amendment every element(s) of the crime must be proved beyond a reasonable doubt.

In a criminal case, the reasonable doubt standard and the felonious intent to commit a criminal act must be upheld. The evidence presented in the above case by the prosecution does not approach the standard for conviction in a criminal case. A criminal conviction cannot be had when the trier of fact believes merely that the scale of justice is tipped slightly in the direction of the prosecution as in the case in question.

Petitioner believes that the issues of law cited above were not addressed by the lower courts and that the Petition for Writ of Certiorari to the Supreme

Court of the United States should be granted and given plenary consideration by the Court.

Respectfully submitted,

Roland C. Blanchet

Roland C. Blanchet
R.D. 2, Box 148
Troy, New York 12182
(518) 235-7678

Filing "pro se"

# APPENDIX

IN THE
STATE OF NEW YORK COURT OF APPEALS
AT ALBANY, NEW YORK

Certificate Denying Leave CPL 460.20

---

The People of the State
of New York - - - - Respondent

v.

Roland Blanchet - - - - Appellant

---

ORDER-Entered January 12, 1981

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

(s) Hugh R. Jones,
Associate Judge
State of New York
Court of Appeals

*Description of Order: Order of County Court, Rensselaer County, dated August 13, 1980 affirming judgment of Police Court, City of Troy, rendered November 29, 1978 (conviction of petit larceny).

IN THE
STATE OF NEW YORK COUNTY COURT
COUNTY OF RENSSELAER

Appeal From Police Court
Order Index No. 134445

---

The People of the State
of New York - - - - Plaintiff-
Respondent

v.

Roland C. Blanchet - - - Defendant-
Appellant

---

ORDER-Entered August 13, 1980

The above-entitled case having come before this Court on appeal from the Police Court of the City of Troy, New York and after reading and examining the record on appeal, the briefs of the attorneys and after hearing the oral arguments on the 29th day of July, 1980 William J. Doyle, Jr., Special Prosecutor, appointed by this

Court by order dated March 5, 1980 to represent the Respondent and Robert M. Cohen, Esq. for the Defendant-Appellant, it is

ORDERED, ADJUDGED AND DECREED, that the conviction of the defendant and fine of $150.00 is in all respects affirmed.

(s) M. Andrew Dwyer, Jr.
County Court Judge
Rensselaer County

STATE OF NEW YORK RENSSELAER COUNTY
TROY POLICE COURT CITY OF TROY

---

The People of the State
of New York - - - - Plaintiff

v.

Roland C. Blanchet - - - Defendant

---

BEFORE: HON. EDWARD O. SPAIN
Judge

Non Jury Trial Held on November 29, 1978, 12:00 Noon
Violation: Section 155.25 P.L. (Petty Larceny)

DECISION OF THE COURT

There are some times that the Court wishes that Solomon were here. But I'm aware of what my responsibilities are and I have to make a determination. I have heard the evidence. I have heard Counsel's argument before, during and after the trial. I'm mindful of the fact that the two gentlemen who testified on behalf of the People testified to having observed Mr. Blanchet with the hose and putting gasoline into

the automobile. I heard Mr. Blanchet's testimony denying that, and he gave an explanation. That I believe that the testimony of his wife was consistent with what the facts that were presented here today was. Generally that the baby had to go to the bathroom, generally that they pulled into the gas station, and generally she had an occasion to observe him get out of the car, and in some way he was back at the gas pump, and in some way he was back at the gas cap area of the automobile. It's my belief that Mr. Blanchet took some gas that day, and it's my belief that he is guilty of petty larceny. I make this determination as the trier of fact and aware of what the law is with respect to that charge. And that is my final determination at this time.

* * *

In view of the fact the charge is a misdemeanor charge, Mr. Blanchet, and I found you guilty of a misdemeanor charge here today, and I believe that is a severe punishment in and of itself, I do intend to impose a fine. And I will impose a fine of $150.00. I will allow a period of three weeks within which that can be paid, if that should cause any hardship. That is your sentence at this time. * * *

(Trial Transcript 116-118)

Office-Supreme Court, U.S.
FILED
JUL 1 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1868

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ROLAND BLANCHET----------Petitioner

versus

THE PEOPLE OF THE STATE
OF NEW YORK----------Respondent

# BRIEF IN OPPOSITION

CHARLES J. WILCOX
DISTRICT ATTORNEY
RENSSELAER COUNTY
COUNTY COURT HOUSE
TROY, NEW YORK 12180
(518) 270-5250

OCTOBER , 1980

## TABLE OF AUTHORITIES


Page

Statutes.....2

U.S.Constitution,Amendment VIII..

U.S. Constitution, Amendment XIV.

New York Criminal Procedure Law, Section 70.20.....

New York Penal Law Section 80.05.

New York Penal Law Section 155.25.


### CASES


People v. Green, 35 N.Y. 2d 437 (1974).....

People v. Henderson, 41 N.Y. 2d 233 (1977).....

In Re Winship, 397 US 358, 90 S. Ct. 1068 (1970).....

## OPINIONS BELOW

The opinion of the County Court for the County of Rensselaer, State of New York, affirming the underlying conviction of Roland C. Blanchet for Petit Larceny is included herein in Appendix A. The opinion of the New York State Court of Appeals denying a certificati on for leave to appeal the County Court decision appears in Volume 52 of New York Reports, Second Edition at Page 901.

## JURISDICTION

The Jurisdiction of the Court is invoked under Title 28, United States Code, Section 1, 257, subdivision 3 which authorizes such a petition where the validity of a state statute is

questioned as being unconstitutional or in violation of the laws of the United States.

1. Was the case against Roland Blanchet proved beyond a reasonable doubt.

2. Was the $150.00 fine imposed excessive by law.

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions here involved are:

a. New York Penal Law Section 155.25 which states that "(a) person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor."

b. New York Penal Law Section 80.05, subdivision 1 which authorizes a court to impose a fine of up

commission thereof." CPL Section 70.20.

## STATEMENT OF THE CASE

The facts underlying the petition for certiorari are as follows:

On November 29, 1978, the petitioner herein was found guilty by the Hon. Edward Spain, Troy Police Court Judge after a non-jury trial of the crime of Petit Larceny in violation of Penal Law Section 155.25. The crime involved the theft by the petitioner of $7.50 worth of gasoline from a Gasland station which is located on Northern Drive in the City of Troy, County of Rensselaer and State of New York. The defendant waived his right to a jury trial of this case on the record.

to $1,000.00 for conviction of a defendant of a class A misdemeanor.

c. United States Constitution, Amendment VIII, which bars excessive fines and cruel and uncensual punishment.

d. United States Constitutional, Amendment XIV and New York Criminal Procedure Law Section 70.20 which both require that " conviction of an offense by verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant's

Ernest R. Anderson, III, the first witness for the prosecution testified under oath that he knew Roland Blanchet. This witness saw the petitioner herein take the pump nozzle from the gasoline pump, place it in the tank of his car and put gasoline in his car. This witness further testified that he spoke with the petitioner during this theft in progress and that the gasoline pumps were well lit and that the pump meter was moving. He testified that the pump that the petitioner used read $7.50 and that the petitioner left the station without paying (Pages 11, 12, 34 and 35 of record) and thereafter the defendant refused to pay.

The second witness for the prosecution, Richard Goyer, who was also an employee on duty, testified under oath that he saw the petitioner pump his own gasoline and then get into his car. (Page 39 of record).

Roland Blanchet called his wife as a witness for the defense. She testified on cross examination that she could not see what transpired (page 95 of record).

The petitioner testified at trial that he took no gasoline.

The trial court found the defendant guilty and sentenced him to pay a fine of $150.00 as punishment for his crime. A notice of appeal to the Rensselaer County Court was filed on December 19, 1978. The court affirmed the conviction.

The defendant then petitioned the New York Court of Appeals for leave to appeal further but this was denied on January 12, 1981.

## SUMMARY OF ARGUMENTS

The trial court found beyond a reasonable doubt that the defendant was guilty of the crime charged. The sentence imposed by this court was within the discretionary limits as outlined in Penal Law Section 80.05, subdivision 1 which authorizes a fine of up to $1,000.00 for conviction of a class A misdemeanor.

## ARGUMENT

In this case, the trial court heard evidence from four witnesses. The court

The court as the trier of fact may have looked to motives, demeanor and biases of these witnesses. A trier of fact is free to accept or reject all or part of the defense or prosecution's evidence. People v. Henderson, 41 NY 2d 233. The judge is an experienced attorney and police court magistrate who is familiar with the fact that at trial, each and every element essential to a crime, must be proved beyond a reasonable doubt. U.S. Constitution, Amendment XIV, CPL Section 70.20. In Re Winship, 35 N.Y. 2d 437 (1974). The court considered all the evidence and found beyond a reasonable doubt that the petitioner was guilty of petit larceny.

This is not a case where an act may occur without affirmative expression of

intent to be shown. There was evidence presented that the petitioner went to a gasoline station and pumped gasoline into his automobile and then refused to pay for these goods. The intent is implicit in the affirmative acts of the petitioner.

After the petitioner was found guilty of petit larceny, a class A misdemeanor, the court imposed a $150.00 fine as its sentence. The court would have been within its discretion to impose a fine of up to $1,000.00, Penal Law Section 155.25, 80.05(1). The court did not abuse its discretion by either its guilty verdict or its imposition of the $150.00 fine.

## CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE RESPONDENT HEREIN SUBMITS THAT A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE.

CHARLES J. WILCOX
DISTRICT ATTORNEY
RENSSELAER COUNTY
(STEPHEN A. PECHENIK,
ESQ., OF COUNSEL)
ATTORNEY FOR RESPONDENT
COUNTY COURT HOUSE
TROY, NEW YORK 12180
(518) 270 - 5250

At a Trial Term of the County Court of the State of New York, held in and for the County of Rensselaer, at the Court House in the City of Troy, New York, on the 29th day of July, 1980.

PRESENT: HON. M. ANDREW DWYER, JR., County Court Judge

STATE OF NEW YORK
COUNTY COURT COUNTY OF RENSSELAER

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

ROLAND C. BLANCHET,

Defendant-Appellant.

ORDER
Index No. 134445

The above-entitled case having come before this Court on appeal from the Police Court of the City of Troy, New York and after reading and examining the record on appeal, the briefs of the attorneys and after hearing the oral arguments on the 29th day of July, 1980 William J. Doyle, Jr., Special Prosecutor, appointed by this Court by order dated March 5, 1980 to represent the Respondent and Robert M. Cohen, Esq. for the defendant Appellant, it is

ORDERED, ADJUDGED AND DECREED, that the conviction of the defendant and fine of $150 is in all respects affirmed.

Dated: August 13 1980

S/M. Andrew Dwyer, Jr.
M. Andrew Dwyer, Jr.

APPENDIX "A"